THE NEW-YORK
CITY-HALL RECORDER.

VOL. VI. *March*, 1821. NO. 2.

At a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 5th day of *March*, in the year of our Lord one thousand eight hundred and twenty-one.

PRESENT.

The Honourable
PETER A. JAY, *Recorder.*
LEONARD KIP, and DAVID BOARD, *Aldermen.*
RICHARD HATFIELD, *Clerk.*
HUGH MAXWELL, *Dist. Att.*

(BIGAMY—EVIDENCE.)

WILLIAM COLEMAN'S Case.

MAXWELL, *Counsel for the prosecution.*
FAY *and* M'EWEN, *Counsel for the prisoner.*

In a prosecution for bigamy, a marriage, *in fact*, must be proved; but to do this, it is not essential that the clergyman who performed the ceremony should be produced.

In such case, though the confession of the prisoner in the police is not conclusive to establish such marriage, still it may be read in corroboration of the affirmative testimony on that point, on behalf of the prosecution.

In this country, a contract of marriage made by persons between the age of fourteen and twenty-one is valid; under the age of fourteen, it is imperfect, and either party after that age may annul it; but, if the parties, or either, marry under fourteen, and continue to live together beyond that age, such marriage is valid.

The prisoner was indicted for bigamy, in marrying Agnes Lowder, in September, 1820, and Charlotte Gamble on the 1st of March, 1821, the said Agnes Lowder, at the time of the second marriage being alive, against the form of the statute, &c.

Susan M'Ginley, on being sworn, testified, that she was present when the prisoner was married to Agnes Lowder, by the Rev. Archibald M'Leod.

Fay objected to the evidence, because it was not the best the nature of the case would admit. The clergyman who performed the ceremony ought to be produced.

The Recorder, without hearing an argument on the other side, overruled the objection. He said it was not essential to produce the clergyman to prove the marriage. A bystander is full as competent. It is not necessary in this country, that a clergyman should perform the ceremony. If it is performed in the presence of witnesses, it is sufficient; and he instanced the mode of solemnizing marriage among the Friends.

Agnes Lowder, the mother-in-law of the prisoner, testified, that he married her daughter, about six months ago, and that they lived together as man and wife about two months, when they parted.

The Rev. John Williams, on being sworn, testified, that he married a young man named William Coleman, and a girl named Charlotte Gamble, on the evening of the 1st of March last; but the witness would not undertake to state positively that the prisoner was the person.

James Gamble testified, that he was the brother of Charlotte Gamble, and that on the evening of the first of March he was married, when the prisoner was his groomsman, and then stood up and was married to the sister of the witness. He was then much in liquor. The parties went away together that evening, but never lived together.

Mr. Williams, on being again called, testified, that the same evening he married Coleman, he married Gamble, whom he knew; but he did not perceive that the former was intoxicated.

David Lansing being sworn, testified, that the prisoner is his son-in-law, and will be eighteen years of age on the 12th of June next; that the witness had never given his consent that the prisoner should be married, and that he is much subject to intoxication.

Further testimony was given on the part of the prisoner, to show that he lived very unhappily with his first wife.

M'Ewen contended, that to constitute a legal marriage there must be the consent of

parents, while either of the parties are under age; marriage, in this state, is a mere civil contract, and if the parties, or either of them, were minors, it is void.—The prisoner, therefore, is not subject to this prosecution for a second marriage.

The Recorder decided, that in this case he considered the first marriage valid, and the prisoner amenable to this prosecution, should the Jury believe that the first was a marriage in fact.

Maxwell offered to read the prisoner's examination in the police.

M'Ewen objected, on the ground that the confession of the prisoner could not establish a marriage in fact.

The Recorder overruled the objection, on the ground that the confession might confirm the circumstantial proof on this point.

The examination which was taken on the 2d of March last, admits the first and second marriage, but states that the prisoner did not consider the first one binding, because he was under age.

Fay contended, that the proof requisite to establish the first marriage had not been produced. The proof should be such as to leave no doubt. The evidence on this point from Susan M'Ginley was not the best the nature of the case would admit: the clergyman might be, and ought to have been, produced.

It was decided by the Supreme Court, in the case of Humphreys, who was convicted of bigamy in the Ulster Sessions, that the confession of the prisoner was not sufficient to establish the first marriage, and that decision applies in this case.

Maxwell read the definition of bigamy, from the 4th vol. of Blackstone's Commentaries, page 163, and insisted, that sufficient evidence had been produced to convict the prisoner. The counsel referred to the testimony of Susan M'Ginley and to the confession, and left the case to the Jury.

The Recorder charged the Jury. He said, that though in some countries polygamy was allowed, yet in all christian countries laws existed to prevent it. Marriage is the foundation of all the social relations of life, while bigamy includes under it an abandonment of a family, adultery, and bastardy.

To convict of this offence, it is necessary that the Jury should be satisfied with the proof of the first marriage, and that at the time of the second marriage, the first wife was living. Susan M'Ginley testifies, that she saw the prisoner married to his first wife; there is other testimony showing that they lived together, and the examination admits the fact. There are no statutes in this country regulating marriage as in England, and the law on this subject here is the same that it stood in that country before the reign of George II. At the age of fourteen, a marriage is valid; and before that age the contract, though imperfect, may be ratified by the parties living together after that age. In England, statutes have been passed, rendering a marriage void contracted under twenty-one, without the consent of parents or guardians. In France, sons cannot marry till thirty, nor daughters until twenty-five, without consent of parents; while in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty.

The prisoner was convicted and sentenced three years to the state prison.

(ASSAULT AND BATTERY—RIGHT OF FISHERY IN NEW-YORK BAY.)

SAMUEL H. OSGOOD'S Case.

MAXWELL, *Counsel for the prosecution.*
RIKER, *Counsel for the defendant.*

The citizens of New-York have the right of fishing in any of the waters of the bay, without interruption.

Bedlow's Island was ceded by the State of New-York to the United States; but this cession did not include any land covered by the waters of the Hudson.

Where an officer in the service of the United States, at Bedlow's Island, ordered one of his soldiers to take a barge, and keep certain oyster boats, engaged in oystering, off from the Island beyond certain stakes set down adjacent to the Island as bounds, and not to suffer them to oyster within such stakes, and the soldier, by force, towed an oystering boat beyond the stakes, and when the oystermen afterwards came purposely within the stakes, towed the boat on shore, it was held that the officer was guilty of an assault and battery on the oystermen in such boat.

By a statute of this state, (1 R. L. p. 189) it is among other things enacted, that "all that certain Island called Bedlow's Island, bounded on all sides by the waters of the Hudson, shall hereafter be subject to the jurisdiction of the United States.—

Provided, that this session shall not extend to prevent the execution of any process, civil or criminal, issuing under the authority of this state, &c."

It is well known that this Island is occupied by the general government as a military post; a number of officers and soldiers in the service being stationed there.

The defendant, a lieutenant in the service, was indicted for an assault and battery, committed on Edward Loundes, on the 9th of February last.

It appeared in evidence, that several days previous to the time laid in the indictment, the defendant, with others, went from this city in a boat, for the purpose of catching oysters near Bedlow's Island, when a barge came off, manned with nine soldiers, who informed the oystermen that if they would give them one third of what was caught, they might oyster there. After they had been engaged some time in oystering, the barge again came off, and the soldiers demanded all the oysters, and actually took nearly the whole. The next time the prosecutor came, he went on the Island, and asked liberty of the officers to oyster there, which being refused, he rowed about one hundred yards from the shore, and began to oyster, when a barge came off with soldiers, who took the oyster boat in tow, and towed her on shore, when the officers threatened to put him in the dungeon.

On the day laid in the indictment, the defendant was the officer of the day on the Island, in the room of Captain Churchell.

The prosecutor, with others, came as usual on the banks to oyster, and commenced their business without asking leave. Serjeant Jacob G. Smith was ordered by the defendant to forbid the oystermen to oyster within certain stakes, set up about three hundred yards from low water mark, and to show them where those limits were. The serjeant, in pursuance of his orders, went in a barge with others, and pointed out the lines, and set down a stake, requesting the oystermen to oyster beyond the lines, as the space within was allotted to the United States. The oystermen did not obey the order, and the boat was towed on shore, when the defendant forbid them to oyster within three hundred and fifty yards of the shore. Notwithstanding this, the oyster-men, after leaving the shore, commenced their business within the stakes, when the serjeant was again sent after them by the defendant, with orders *to keep them beyond the lines*. The serjeant proceeded in the barge to the oyster boat, and imparted the orders he had received, but the oystermen refused to quit their station, when the serjeant took up the anchor, threw it overboard, and towed the boat beyond the lines. The oystermen purposely returned to their former station, when the serjeant again towed the boat on shore, where the oystermen, according to their testimony, were threatened by the defendant with being blown out of water by a four pounder, if they persisted in oystering within the limits; and, after being kept for some time, were ordered by him to go about their business.

Riker, in his remarks to the Jury, insisted, that the orders either to tow the boat beyond the stakes or ashore, did not emanate from the defendant; and that the serjeant, in the performance of those acts, exceeded his authority, which was to keep the boats beyond the lines.

Maxwell, in addressing the Jury, said, that it was not so much for the injury the prosecutor had received, that this prosecution was instituted, as for the principle.—The oystermen had a right to fish in any of the waters of the bay, without interruption: for the state in its session had not relinquished this right. These men stood on their rights, and the question was now to be tested. As to the orders received by the serjeant, he acted in pursuance of them, both in towing the boats beyond the stakes and on shore; and as this was done forcibly, and without the consent of the prosecutor, the defendant is legally responsible.

The Recorder charged the Jury, and observed, that as this prosecution had probably been commenced for the purpose of ascertaining the law, he would state it more fully than perhaps the facts of the case required. That the legislature of this state had ceded to the United States Bedlow's Island, but had not ceded the waters of the New-York Bay. That those waters, and the land beneath them, remained as before the session. That all navigable waters, and the soil they covered, belonged to the people of the state, except such parts of them only as had been granted to individuals;

and that no such grant had been pretended in relation to the oyster beds in question: that by the common law, every citizen of the state had a right to fish in the waters of the sea, and in the ports and havens within the boundaries of the state, and that this right could only be appropriated to individuals by legislative authority: that in England, in ancient times, the kings had in some instances granted exclusive rights of fishery; but that some of the greatest judges of that country had denied that the crown was now possessed of that prerogative, and that it had never been exercised since the revolution, which placed William on the throne; at all events, it was the legislature only who in this state could authorise such exclusive grant. That the officers of the United States had, therefore, no exclusive right of fishery in any part of the waters of the New-York harbour. That possibly there might be cases in which the garrison on Bedlow's Island would be justified in preventing the approach of boats to the shore, but no such circumstances were shown in the present instance; and therefore, that the defendant had failed in making out a justification; that his counsel had contended that the proof did not support the indictment, but the Court thought otherwise. The defendant had ordered a serjeant and seven men to keep the prosecutor off the oyster bank, and to compel him to retire beyond certain limits; that the serjeant, in execution of those orders, and in the presence of the defendant, had repeatedly removed the prosecutor by force; that the defendant was answerable for the acts necessarily done in obedience to his own orders, and that therefore, if his own witnesses were believed, he was guilty.

The Jury found the defendant guilty—whereupon the Court said, that as the conduct of the lieutenant had probably proceeded from misunderstanding the law, and had not been marked by any great degree of violence, they would only impose a fine of one dollar and the costs, but intimated, that if cases of a similar nature should hereafter occur, the same lenity was not to be expected.

(ASSAULT AND BATTERY—DISTRESS—RIGHT OF ENTRY.

EZRA CALDWELL and SAMUEL LEARNED'S Case.

MAXWELL, *Counsel for the prosecution.*
SCOTT, *Counsel for the defendants.*

When the officer who makes distress has the goods of the tenant, and the keys of an inner room for depositing them, voluntarily delivered him by such tenant, such officer afterwards has a right of access to the goods, nor can the tenant legally prevent him.

The defendants were indicted for an assault and battery on Azel Conklin, a constable, while in the due execution of the duties of his office, on the 13th of February last.

It appeared that the prosecutor was employed as a bailiff to distrain for rent due by Caldwell, to the amount of $170. The *locus in quo* was Grand-street. The day preceding that laid in the indictment, the prosecutor went there and made the distress, when Caldwell voluntarily delivered to him the goods, and the key of an inner room, where the officer deposited them. Caldwell promised to procure security the next day, at which time the prosecutor, in company with Nathaniel Slawson, went there and found the outer doors secured, and entrance denied. Caldwell afterwards came out; and, while the officers were about entering, he resisted them; and Learned, the other defendant, encouraged this resistance, said, that a *man's house was his castle*, and that were he in Caldwell's place, he would blow their brains out. It did not appear, however, that he otherwise took an active part in the resistance.

After the arguments of the respective counsel, the Recorder charged the Jury, that the tenant having delivered the officer the key, and suffered him to enter the room and deposit the goods, had no right afterwards to prevent his entrance, for that such permission operated as a lease to the officer. In preventing the officer from having access to that room, the defendant was a wrong doer, and responsible in this prosecution.

He was convicted, and fined $20 and the costs; and Learned was acquitted.

SUMMARY FOR FEBRUARY TERM, 1821.

GRAND LARCENY.

Peter Johnson, John Williams, and Francis Mersereau, were severally indicted, tried, and convicted of this offence; Williams, for stealing the goods of John M'Kinstry; Mersereau, those of Joel Ketcham; and Johnson, those of Marcus Bulford. Johnson was sentenced to the state prison five, Williams seven, and Mersereau fourteen years.

PETIT LARCENY.

Henry, al. William H. Tryon, William Pugsley, Mary Reeves, al. Cane, were severally indicted, tried, and convicted of this as a second offence; and Tryon and Pugsley were sentenced to the state prison three years, and the sentence of Guche was suspended.

James Davis, Henry Hutchinson, Sam. Whitlock, William Johnson, Wm. M'Donell, Catherine Johnson, John Dent, Sylvia C. Lewis, Edward Regan, Eliza Hall, Benjamin Purdy, James Cuffy, Patrick Gilligan, Jacob Camp, John Williams, William Cox, Robert Adams, and *Henry Underhill,* were severally indicted and convicted of this offence, and the two first were sentenced to the penitentiary thirty months each, the third two years, the three following eighteen months each, the seven following six months each, and the remainder for shorter periods.

ACT OF THE LEGISLATURE.

During the present session of the Legislature, (February, 1821,) an act was passed, entitled, "An Act for the establishment of a Court of Common Pleas in the City and County of New-York, and for the appointment of a first Judge of the same."

The first section provides, that from and after the first day of April next, the Mayor's Court shall be the Court of Common Pleas or County Court of the City and County of New-York, and shall be held on the days and times on which the Mayor's Court is now appointed to be holden, and shall have power to hear, try, and determine, according to law, all actions, real, personal, and mixed, arising within the said city and county; and also, all transitory actons, although the same may not have arisen within the said city and county; and to grant new trials in all cases where the said court shall find it necessary and proper, provided, that no new trial shall be granted otherwise than for irregularity, unless one of the Judges, present and concurring, shall be of the degree of counsellor at law in the Supreme Court of this state.

Sec. 2d provides, that the first Judge of the said court hereinafter mentioned, and the Mayor, Recorder, and Aldermen shall be the Judges of the said court; and the said first Judge, the said Mayor, or the said Recorder, singly or together, with one or more of the said Judges, shall have full power to hold the said court.

Sec. 3d. In addition to the powers before mentioned, the court shall possess all the power and jurisdiction of the Mayor's court.

Sec. 4th provides, that the council of appointment shall appoint the first Judge of the said court, who shall hold his office during good behaviour, or until sixty years of age.

Sec. 5th. The style of the said court shall be the Court of Common Pleas for the City and County of New-York. Proceedings commenced in the Mayor's court shall be continued in this court.

Sec. 6th. The first Judge, the Mayor and Recorder, and the Aldermen of the said city, or any three of them, of whom the Judge, or the Mayor, or Recorder shall always be one, shall have power to hold the court of Sessions.

Sec. 7th. The Sessions shall have the same power to hear and determine any indictment for any crime, punishable with imprisonment in the state prison for life, when the first Judge presides, as that court has when the Mayor or Recorder presides.

Sec. 8th. The first Judge may make any order in vacation relative to any suit or proceeding in the Common Pleas, in like manner as is practised by the Judges of the Supreme Court at chambers.

Sec. 9th. The first motion fee to be paid to the first Judge instead of the Recorder.

Sec. 10th. The Mayor, Recorder, and commonalty shall pay out of the treasury of the city to the Recorder of said city, an annual salary of not less than $1500, nor more than $2000, at discretion.

Sec. 11th. The salary of the Mayor fixed at not less than $3000, nor more than $4000, in the discretion of the Mayor, Recorder, and commonalty.

Sec. 12th. That it shall be the peculiar duty of the said first Judge to hold the said court of Common Pleas, and that it shall be the peculiar duty of the said Recorder to hold the said court of General Sessions of the Peace; but that it shall nevertheless be lawful for the said first Judge to hold the said court of Sessions, and for the said Recorder to hold the said court of Common Pleas.

John T. Irving, Esq. counsellor at law, in this city, was appointed to the office of first Judge, under the preceding act.

SUMMARY FOR MARCH TERM.

FORGERY.

Richard Cornwell was convicted, on confession, of the forgery of a check of $150, on the Mechanic's Bank, forged in favour of S. and W. Knapp, and was sentenced to the state prison seven years.—There were charges against him for forging several other checks. He was a member of one of the Baptist meetings in this city, in full communion, and forged the checks against his pastor and fellow-members.—On being brought to the bar for sentence, he expressed much contrition; said he never intended to defraud any man, and that when he committed the act, he was much embarrassed.

PERJURY.

Valentine Durant and *Patrick Boyland* were indicted, tried, and convicted of this offence, on the most satisfactory testimony, and they were sentenced to the state prison seven years each. (See 5th vol. City-Hall Recorder, p. 183.)

GRAND LARCENY.

Richard Sarles, *Jacob Wyckoff*, and *James Farrington*, were severally indicted, tried, and convicted of this offence, all for stealing the goods of Thomas White, and the two first were sentenced to the state prison five, and the last seven years.

PETIT LARCENY.

Lucy Donnell, *John Brown*, *Aaron Peterson*, *Jane Buckley*, *Henry Few*, *Jane Berry*, *Thomas Jackson*, *William Wilson*, *Platt Mills*, and *James Green*, were severally indicted and convicted for this offence. (Brown on three indictments.)—The first was sentenced to the penitentiary two years; Brown six months on the first, and two years on each of the other indictments, imprisonment on the second and third to commence after the expiration of the first and second term; the five following for six months each, and the remainder for shorter periods.

APPOINTMENTS.

Stephen Allen, Esq. one of the Aldermen, was appointed Mayor of this city, in room of the Hon. Cadwallader D. Colden, removed.

Richard Riker, Esq. was appointed Recorder, in room of the Hon. Peter A. Jay, removed.

Hugh Maxwell, Esq. was appointed District Attorney, in room of Pierre C. Van Wyck, Esq. removed.

Richard Hatfield, Esq. was appointed Clerk of the Sessions, in room of John W. Wyman, removed.

Samuel B. Romaine, Esq. was appointed Clerk of the Sittings, in room of John M'Kesson, Esq. removed.

John L. Broome, Esq. was appointed Clerk of the Common Pleas, in room of Benjamin Ferris, Esq. removed.

And Mordecai M. Noah, Esq. was appointed Sheriff of the City and County of New-York, in room of James L. Bell, Esq. removed.

The preceding appointments were made in the present month of March.